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PART PERFORMANCE IN RELATION TO PAROL CONTRACTS FOR THE SALE OF LANDS

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ON the two hundred and fiftieth anniversary of the enactment of the Statute of Frauds,¹ a contemporary British writer proposed that the occasion be celebrated by a dinner to be given in honor of the Statute in one of the Inns of Court. While urged on the one hand to invite a suitable number of litigants who had been deprived of their rights by means of the Statute, the hosts were warned on the other hand, to take care that none of the silver disappear if the celebrants included those who had sheltered themselves behind the Statute's useful provisions.²

More direct in the expression of their condemnation, other critics have recommended the outright repeal of what has been termed, "this piece of morbid anatomy."³ But the Act has mustered sufficient friends to block the attempts to strike it from the books, despite the fact that it has proved to be a perpetual source of litigation, and notwithstanding that the evils responsible for its adoption have long since disappeared.

Although poor draftsmanship created uncertainties in the Statute requiring judicial clarification, no small part of the blame for the mass of litigation may be credited to a faulty construction of the Act by the judges themselves. Indeed, if Lord Nottingham, who claimed the authorship of the Act,⁴ could have foreseen the controversies caused by the ambiguous language of Section Four, he would no doubt have been quick to give the "judges and the

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1. Statute 29 Car. II, c. 3 (1677).

2. Note, 43 L. Q. Rev. 1 (1927).

3. *Id.* at 2.

4. 6 Holdsworth, History of the English Law 384 (1924).

civilians," entire credit for this section. He might even have divulged the meaning of the Law, which he professed to know.⁵

But Lord Nottingham passed on the task of construing Section Four of the Enactment to future generations of judges. That they have not entirely succeeded in their task is attested by the fact that the application of the doctrine of part performance is not much more certain than it was two hundred and seventy years ago. This is demonstrated by the fact that as recently as 1948 a distinguished equity scholar reviewed the litigation for the year previous, and concluded that however well the doctrine of part performance had been worked out as a matter of principle, the cases were, nevertheless, in "a welter of confusion."⁶

It is the author's contention that the present confusion in the law of part performance is due primarily to its historical development. This, we propose to establish by showing that over a long period of time there were divergent views among the English judges, both as to the reasoning underlying part performance, and as to its advisability as a matter of policy. These differences of opinion culminated in a belated attempt to discredit the doctrine altogether. Nevertheless, the judges were consistent in their determination of the acts that constituted part performance, and in their acceptance of the doctrine as a part of equity jurisprudence.

Unfortunately, the principle of part performance was received in this country during the period in which it was being questioned in England, although no proposals were being entertained for its abolition in that country. When considered in the light of this development, the British cases become of importance not only from the viewpoint of their influence in the shaping of the English Law, but also in relation to the reception of the concept of part performance in the United States.

While the discussion of the American cases because of their number will be limited to those involving parol agreements for the sale of freehold interests, the English decisions include litigation involving both leasing contracts and contracts of sale. The latter

5. *Ash v. Abdy*, 3 Swanst. 664; 36 Eng. Rep. 1014 (Ch. 1678). The Lord Chancellor is quoted as having said, "I had some reason to know the meaning of this law; for it had its first rise from me who brought in the bill into the Lord's House, although it afterwards received some additions and improvements from the judges and the civilians."

6. Simpson, *Equity* in 1947 Annual Survey of American Law 803, note 96 (1948).

jurisdiction did not recognize a difference between the two transactions insofar as part performance was concerned.⁷

PART PERFORMANCE PRIOR TO THE STATUTE OF FRAUDS

Due to the research of Professor Barbour⁸ fifteenth century chancery cases have been brought to light, disclosing that parol agreements to sell land were enforced in equity a score of years before their validity was recognized in the courts of law.

Although the petitioner in these ancient bills particularized any damage resulting from his reliance on the defendant's oral promise, allegations of special injury were not essential. Such facts were stated by the complainant solely for the purpose of presenting his case in its strongest light; for the litigant, it must be remembered, was appealing to the Chancellor's mercy. It will be recalled that fifteenth century chancery judges were ecclesiastics who were steeped in the idea that faith should be kept in agreements,⁹ and who enforced parol contracts of all types where a remedy was unavailable in law.

During the sixteenth and seventeenth centuries equity continued to specifically enforce oral agreements. The origin of a remedy in contract no doubt influenced the Chancellor to surrender jurisdiction in controversies relating to the sale of chattels, although he still decreed specific performance on the part of recalcitrant vendors of land.

But the passage of time witnessed a new development in equity practice, for where formerly the Chancellor had decreed performance of all land contracts, the records disclose that during this period relief was sometimes denied.¹⁰ Generally the reasons for refusing assistance are not given, although the Lord Keeper is purported to have stated in one instance that it would be good for the commonwealth if no parol leases were allowed,¹¹ while in another case he proposed to avoid perjury and other abuses by refusing to enforce oral leases.¹²

7. It was the nature of the Act, not the estate conveyed that was the decisive factor in making the determination of whether specific performance should be decreed.

8. Barbour, *History of Contract in Early English Equity* in 4 Oxford Studies in Social and Legal History 116 (1914).

9. 1 Holdsworth, *History of the English Law* 455 (3d ed. 1923).

10. St. Germaine, *The Doctor and Student* 62 (Muchall ed. 1874). Writing in 1523, St. Germaine declared, "But if a man sells his lands by a sufficient and lawful contract, though there lack livery of seisin or such other solemnities of the law, yet the seller is bound in conscience to perform this contract. But in this case the contract is sufficient, and so me thinketh great diversity betwixt the cases."

11. Anon., Cary 27, 21 Eng. Rep. 15 (Ch. 1603).

12. Anon., Cary 7, 21 Eng. Rep. 4 (Ch. 1597-98).

Although scarce in number and scanty in detail, the reports of the chancery cases, nevertheless, reveal a greater willingness to decree specific performance of contracts involving the transfer of freehold interests, than estates for years.¹³ Tothill and other contemporary reporters relate the granting of equitable assistance because of a want of livery,¹⁴ a defective assurance,¹⁵ or upon the vendor's refusal to perform.¹⁶

Eighteenth century authorities, writing on the subject of part performance in the above Period, bear out these conclusions, Viner's Abridgement includes suits decided during the preceding two centuries, and throws light on the development of part performance in this period. Cases are reported in which equity decreed specific performance under such circumstances as the death of the vendor before assurance was perfected, and upon the failure of the lessor to give livery to a lessee in possession.¹⁷

Although written somewhat later, an historic work on the law of vendor and purchaser warns the reader that he cannot be too cautious in distinguishing between the cases decided before the Statute of Frauds and those decided afterwards. Following a discussion of such problems as the effect of a transfer of possession or of part payment as acts of part performance, the author concludes the presentation with the observation that equity seems to have been guided by the same rule in compelling a specific performance of parol agreements before the Statute, as have been adhered to since.¹⁸

It seems probably that by 1677, Chancery judges had formulated a pattern for enforcing oral agreements relating to the land contracts. For proof that such jurisdiction was recognized, we turn to the implied acknowledgment of such practice found in *Ash v. Abdy*¹⁹ decided in 1678, and to the express recognition in *Marquis of Normandy v. Duke of Devonshire*,²⁰ adjudged twenty-one years

13. Page v. Spencer, Cho. Cas. Ch. 149, 21 Eng. Rep. 88 (Ch. 1581); Nichols v. Lonell, Cho. Cas. Ch. 171, 21 Eng. Rep. 99 (Ch. 1583). However, specific execution of leases were decreed in *Redman v. Torrell*, Tot. 69 (1820 ed.), 21 Eng. Rep. 126 (Ch. 1575-76); *Prince v. Green*, Tot. 127, 21 Eng. Rep. 144 (Ch. 1598); *Hungerford v. Austein*, Nels. 47, 21 Eng. Rep. 786 (Ch. 1650).

14. *Conquest v. Newdigate*, Tot. 42, 21 Eng. Rep. 118 (Ch. 1611-12); *Moreton v. Briggs*, Tot. 43, 21 Eng. Rep. 118 (Ch. 1619).

15. *Bodenham v. Bodenham*, Rep. t. Finch 174, 23 Eng. Rep. 96 (Ch. 1674).

16. *Hungerford v. Hutton*, Tot. 63, 21 Eng. Rep. 124 (Ch. 1569-70).

17. 13 Vin. Abr. 205 (2d ed. 1791).

18. Sugden, *The Law of Vendors and Purchasers of Estates* 86 (1807).

19. 3 Swanst. 664, 36 Eng. Rep. 1014 (Ch. 1678).

20. 2 Freem. Ch. 216, 22 Eng. Rep. 1169 (Ch. 1697).

later. In the later case it was declared, "Before the statute of frauds and perjuries, this court would not execute a parol agreement, unless it had been executed in part of one side or the other; and then it would, because it was but reason, when one party had performed of his part, that the other party should be compelled of his part."²¹

DOES THE FOURTH SECTION OF THE STATUTE
APPLY TO LAND CONTRACTS IN EQUITY?

Legal scholars until the twentieth century explained the doctrine of part performance either on the ground that an inherent equity arising from acts performed by one of the parties in reliance on the agreement gave chancery jurisdiction notwithstanding the Statute,²² or on the theory that the enactment applied to both law and equity despite the inequities which might be produced and that the cases holding otherwise had been incorrectly decided.²³

The above conceptions were so entrenched in the literature of the day that the more recent analysis of Professor Costigan, who proposed that Section Four of the Statute had never applied to suits in equity, made little impression on courts or scholars. Nevertheless, his arguments if viewed in the historical perspective of the development of part performance, are convincing and deserve further consideration.

Examining the first draft of the bill introduced in the House of Lords in 1673,²⁴ Costigan found that Section Four provided that actions in debt, case or other personal actions could not be brought in excess of a designated amount, if the action was based on an oral agreement. Reasoning that the phrase, "no action shall be brought," embodied in the Bill as finally enacted, was merely a refinement of words used in the first draft,²⁵ he concluded that the Section ap-

21. *Ibid.*

22. See Pollock, *Principles of Contracts* 611 (4th ed. 1885); Gilbert, *The History and Practice of the High Court of Chancery* 231 (1758).

23. See 3 Parsons, *Law of Contracts* 394 (5th ed. 1866).

24. Costigan, *Has there been Judicial Legislation in the Interpretation of the . . . Statute of Frauds*, 14 Ill. L. Rev. 1, 9, note 26 (1919).

25. The first bill introduced in 1673 is reproduced in Henning, *The Original Drafts of the Statute of Frauds and their Authors*, 61 U. of Pa. L. R. 283, 285 (1913). The appropriate section read as follows, "And be it further enacted by the Authority aforesaid That in all actions upon Case Actions of Debt or other personal Actions which from and after the day of shall be commenced upon any Assumpsit Promise Contract or Agreement made or supposed to be made by Paroll and Whereof noe Memorandum Note or Memoriall in writing shall bee taken by the Direction of the parties thereunto noe greater damages shall at any time be recovered than the some of Any law usage to the Contrary notwithstanding."

plied only to actions at law as distinguished from "bills" or "suits" in equity.

Before Costigan's findings are rejected, it may be remembered that Chancery had specifically enforced parol contracts for the sale of lands for more than two hundred years.²⁶ If the Statute was intended to dislodge this ancient jurisdiction, its framers could have provided for this drastic change in explicit language. The draftsmen made known their intentions with reference to Section One when they expressly stated that in "law or equity" parol agreements shall have a stated effect.²⁷ From the absence of similar language in Section Four it may reasonably be implied that equity does not come within its provisions.

The authors of the Statute could have accomplished their objective of eliminating oral conveyances in Section One of the Act, without necessarily invalidating parol contracts in Section Four, since the latter does not create an estate but only a possibility of specific performance under the rules of chancery. It is not the oral contract but the decree of the court or the act of the parties performed pursuant to the decree, that transfers the estate. There can be no greater objection to conveying an interest in land by operation of the chancellor's decree than to transferring rights by judicial record in a fine and recovery.

Since Section Seventeen of the Act provided that part performance will take an oral sale of goods out of the Statute, it has been reasoned that the absence of a similar provision in the Fourth Section creates an inference that Parliament did not intend to apply the doctrine of part performance to land contracts.²⁸ This would be a plausible argument were it not for the fact that the Statute must be construed in light of the remedies existing at the time of its enactment, which included suits for specific performance when the contract related to land, but not so if the subject matter of the agreement was a chattel. A contrary implication arises from that suggested; for the language in Section Seventeen reveals that the question of part performance was considered by the draftsman, and

26. Text *supra* at note 8.

27. That Section 1 of the first bill applied to equity is indicated by the following language, "*Bee it Enacted* that from and after the day of All Leases Estates Interests or Termes of Yeares of in to or out of any measuges mannors Lands Tenements or Hereditaments made or unto shall have the force and effect of leases or estates at will, only and shall created by Paroll and not put into writing by direction of the parties thereunto shall have the force and effect of leases or estates at will, only and shall not either in Law or Equity bee deemed or taken to have any other or greater force or effect. . . ."

28. *Clinan v. Cooke*, 1 Sch. & Lef. 22 (Ir. Ch. 1802).

his act of adding part performance to oral sales of chattels, and his silence on the effect of part performance in parol contracts for the sale of lands, points to his approval of the doctrine. Here again, if the Statute's framers intended to abolish an existing remedy in equity, they would have used language designed to achieve the desired result.

A third reason for supporting Costigan's conclusion lies in the fact that the Chancery judges during the period immediately following the adoption of the Statute, for the most part did not question their jurisdiction to grant relief where the contract was partly performed. It is not without significance that the House of Lords only twenty-three years after the Statute's adoption recognized part performance.²⁹ Contemporaneous interpretations by judges,³⁰ some of whom must have participated in its enactment, and who were familiar with the former practices of equity, are not to be considered lightly in searching for the meaning of the Statute.

It has been argued that the Statute in its entirety did not apply to Chancery because the purpose of the Enactment was to prevent juries from deciding cases on perjured testimony, and since the chancellor resolved controversies without the aid of juries, it was not likely that he would be misled. If that were true, why did Section One apply to equity? Unless this Section can be explained in terms of providing a uniform system of conveyancing, Section One refutes the proposal that equity was excluded from all of the provisions of the Statute. This conclusion, however, does not weaken the case for excluding equity from controversies arising from Section Four.

A SURVEY OF THE CONTROLLING BRITISH CASES DECIDED AFTER 1677

In view of the subsequent disagreement among the authorities as to the basic theory underlying part performance, it is interesting to note that the first three cases decided after the enactment of the Statute do not purport to establish any general principles governing the application of the doctrine.

One of the first cases³¹ arising under the new Act was *Hollis v.*

29. *Lester v. Foxcroft*, Colles 108, 1 Eng. Rep. 205 (H.L. 1700).

30. Costigan, *supra* note 24.

31. In 2 Eq. Cas. Abr. 48, An unnamed case is stated as follows, "The first case in Lord Nottingham's time, where there was an absolute conveyance and a defeasance, which defendant could not execute, but insisted on the Statute and it was overruled." This appears to be a mortgage rather than a sale.

Edwards,³² adjudged in 1683 by the Lord Keeper. The plaintiff alleged an execution of a parol agreement for a lease and a subsequent expenditure of money made in reliance on the agreement. The Lord Keeper was of the opinion that plaintiff could recover damages at law for the non-performance of the contract and if that were the case, he had no doubt that he could decree performance in equity. The defendants were ordered to admit the agreement for the purpose of bringing an action at law, and were advised that after judgment was rendered, equity would further consider the case. The plaintiff was non-suited at law, and his bill in equity dismissed, the report being silent as to the reasons for the subsequent dismissal in Chancery. The Court's opinion revealed that it was puzzled as to how the Statute should be applied; the Lord Keeper suggesting that while the Act voided the estate, it did not void the agreement. The fact that the Court dismissed the suit may indicate later doubts on the part of the Lord Keeper, although of course there is no way of knowing if this were true. However, the distinction between void estates and void contracts, recognized in this controversy is important, for without the distinction, there can be no basis for equitable jurisdiction in this type of case.

Two years later in the leading case of *Butcher v. Stapely*,³³ specific performance was decreed against a defaulting vendor and a subsequent grantee who took with notice of the prior oral agreement. The plaintiff set out as part performance the act of placing his cattle upon the land. The pith of the Chancellor's opinion is found in a single sentence in which he stated, "Inasmuch as the possession was delivered according to the agreement, he took the bargain to be executed and that it was a contrivance between the defendants to avoid the bargain."³⁴ The case has generally been cited as authority for the proposition that delivery of possession is in itself a sufficient part performance to take a case out of the Statute.

Any doubt that may have remained in the minds of the judges as a result of a possible conflict between the first two cases, was removed by the decision rendered in 1700 by the House of Lords in *Lester v. Foxcroft*.³⁵ Reversing the Lord Chancellor, who had strictly applied the Statute, the High Court enforced an oral lease for ninety-nine years where the lessee had taken possession and had

32. 1 Vern. 159, 23 Eng. Rep. 385 (Ch. 1683).

33. 1 Vern. 363, 23 Eng. Rep. 524 (Ch. 1685).

34. *Id.* at 365, 23 Eng. Rep. at 525.

35. Colles 108, 1 Eng. Rep. 205 (H.L. 1700).

erected buildings pursuant to the terms of the agreement. The decree was enforced against the devisee of the lessor who had prevented the plaintiff from completing the agreement during the lifetime of the lessor. While it has been suggested that part performance should be decreed only in situations involving fraud, eighteenth century courts did not read any such limitation in the *Foxcroft* case. It is not reported on what theory, if any, the Court based its decision.

The picture with reference to general principles changes in 1703 for in the controversy of *Floyd v. Buckland*³⁶ we find the Master of Rolls laying down a general principle in the form of equitable fraud as the basis for granting relief. A lessee had entered the premises and had built a wall in accordance with the terms of the parol agreement. Decreeing specific performance on behalf of the lessee, the court observed that the "Statute was not made to encourage frauds and cheats."³⁷

A question which produced great difficulty on both sides of the Atlantic, arose in England in 1702 in the litigation styled *Croyston v. Banes*.³⁸ The defendant had confessed the oral agreement in his answer. Declaring that the object of the Statute was to prevent perjury, the court argued that if the agreement was admitted there could be no perjury, and that there remained no reason why the Statute should apply. Specific execution would be decreed even in the absence of an allegation of part performance on the part of the plaintiff.

Adding a refinement, the court noted in 1723³⁹ that if the defendant confessed the oral agreement in his answer, the contract would be enforced even though the defendant also pleaded the Statute of Frauds. Subsequent dicta⁴⁰ supporting this questionable holding prolonged its life for another fifty years. However, in *Whitchurch v. Bevis*,⁴¹ decided during the last quarter of the eighteenth century, the court rejected the theory that the Statute was waived if the parol contract was confessed. Succeeding cases⁴² following the holding in the *Whitchurch* litigation, ended the controversy. From then on, unless the plaintiff alleged acts of part performance, the defendant could always invoke the aid of the Statute. If part

36. 2 Freem. Ch. 268, 22 Eng. Rep. 1202 (Ch. 1703).

37. *Ibid.*

38. Prec. Ch. 208, 24 Eng. Rep. 102 (Ch. 1702).

39. *Child v. Godolphin*, 1 Dick. 39, 21 Eng. Rep. 181 (Ch. 1723).

40. *Gunter v. Halsey*, Amb. 586, 27 Eng. Rep. 381 (Ch. 1739).

41. 2 Dick. 664, 21 Eng. Rep. 430, (Ch. 1786).

42. *Moore v. Evans*, 4 Ves. Jr. 23 (Ch. 1798); *Bragdon v. Bradbear*, 12 Ves. 466 (Ch. 1806).

performance was pleaded, the question was then one of fact to be established by evidence.

In 1709 in the case of *Lord Pengall v. Ross*,⁴³ the issue of whether the payment of part of the purchase price was a sufficient part performance to justify equitable relief, was raised for the first time. In unequivocal language the court voiced its opinion, declaring, "There must be something more than bare payment of money on the one part to induce the Court to decree a specific performance."⁴⁴ Followed in later litigation,⁴⁵ the holding in the *Ross* case would have conclusively decided this issue had it not been for the dicta of Lord Hardwicke in *Lacon v. Mertins*,⁴⁶ when he mistakenly but convincingly announced that payment of money had always been held a part performance in Chancery. Despite subsequent holdings to the contrary,⁴⁷ Lord Hardwicke's declaration resulted in the question being declared an open one as late as 1815,⁴⁸ and it was not put to rest in England until late in the nineteenth century.⁴⁹

It was in 1739⁵⁰ that the Chancellor announced that the acts relied upon to show part performance must be solely referable to the contract. Expressing the rule in another form, a later court declared that the act relied upon must be, "an act . . . unequivocally referable to the agreement."⁵¹

The unequivocal reference theory fails to explain the basis underlying part performance, but acts only as a test of exclusion. It may be compared to the tort rule of proximate cause which sometimes results in the denial of recovery on the ground that causation in law does not exist, although causation in fact has been established. The exclusionary effect of the rule is demonstrated in the case in which it originated, for there it was held that the acts relied upon did not unequivocally refer to a contract to renew the lease."⁵²

That there may be a variety of acts that would satisfy the standards of equity for determining part performance, was recognized by the House of Lords as early as 1765 in *Whaley v. Bagnel*.⁵³ Re-

43. 2 Eq. Cas. Abr. 46, 22 Eng. Rep. 40 (Ch. 1709).

44. *Ibid.*

45. *Seagood v. Meale*, Prec. Ch. 560, 24 Eng. Rep. 251 (Ch. 1721).

46. 3 Atk. 1, 26 Eng. Rep. 803 (Ch. 1743).

47. *Main v. Melbourn*, 4 Ves. Sr. 719, 31 Eng. Rep. 372 (Ch. 1799); *Clinan v. Cooke*, 1 Sch. & Lef. 22 (Ir. Ch. 1802).

48. *Aveling v. Knipe*, 19 Ves. 440, 34 Eng. Rep. 580 (Ch. 1815).

49. *Britain v. Rossiter*, 11 Q. B. D. 123 (1879).

50. *Gunter v. Halsey*, Amb. 586, 27 Eng. Rep. 381 (Ch. 1739).

51. *Morphett v. Jones*, 1 Swanst. 172, 181, 36 Eng. Rep. 344, 348 (Ch. 1818).

52. *Ibid.*

53. 6 Bro. P. C. 45, 1 Eng. Rep. 611 (H.L. 1765).

viewing a decision of the Lord Chancellor of Ireland based on a comparable Statute, it was adjudged that the delivery of a rent roll was not sufficient part performance to take the case out of the Statute.

Declared the High Court in reaching the decision, "Contracts partly executed by delivery of possession, receipt of some of the purchase money, or attendant with some fraud on the part of the vendor who has made use of the Act for sheltering such fraud, are justly decreed to be specifically performed; but those were quite foreign to the present case."⁵⁴

For some unexplained reason the opinion in the *Whaley* case had little influence in the United States. This was unfortunate for the decision clearly expressed a recognition that part performance could not be explained on any single theory, but that in any one of a possible variety of circumstances, equity might consider it unjust to deny specific execution. If the broader principle had been accepted by the American Courts, much of the confusion now existing would have been avoided.

The Irish Courts, however, did exercise a strong influence in some of the American states as evidenced by the acceptance of the language of an opinion rendered by Lord Redesdale in 1804.⁵⁵ Sued for specific performance of a parol agreement to grant a lease for three lives, the defendant admitted an agreement to grant a lease for one life, and pleaded the Statute to any claim for the longer term. Refusing relief to the plaintiff, the Lord Chancellor found that inasmuch as the lease for one life was admitted, the plaintiff was rightfully in possession, and the denial of specific performance would not make the lessee a trespasser.

In an opinion which greatly influenced American jurists, Lord Redesdale stated, "I am not disposed to carry the cases which have been determined on the Statute of Frauds any further than I am compelled to by former decisions; That Statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity, than the relaxation of that Statute has been a ground of much perjury and fraud."⁵⁶

Also widely cited in the States was *Morphett v. Jones*,⁵⁷ decided in 1818. In reliance upon the defendant's oral promise to grant a

54. *Id.* at 617.

55. *Lindsay v. Lynch*, 2 Sch. & Lef. 1 (Ir. Ch. 1804).

56. *Id.* at 5.

57. 1 Swanst. 172, 36 Eng. Rep. 344 (Ch. 1818).

lease for a term of twenty-one years, plaintiff had taken possession of the premises. Shortly thereafter he was served with notice to quit. In an action to restrain the defendant from proceeding at law to recover the premises and to compel the defendant to execute the lease, the Master of the Rolls decreed a specific performance of the agreement. The basis for his action, declared the court, was that, "A party who permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad."⁵⁸

It was also stated in the *Morphett* case that, "Admission into possession, having unequivocal reference to such contracts, has always been considered an act of part performance."⁵⁹ Contrary to the theory suggested by some courts, delivery of possession was not recognized as an act of part performance because it tends to show that a contract has been made. What the Master of the Rolls was stating was that admission into possession was an act that would not have happened in the absence of a contract. But the determination of whether or not specific execution of the oral agreement would be ordered would depend on other factors than the fact that a contract has been proved.

In deciding the nature of acts that would be recognized as part performance, the English Courts in a series of cases held that continuation of possession by a lessee as distinguished from entering into possession;⁶⁰ the giving of instructions to an attorney to draft a lease,⁶¹ or draw a conveyance;⁶² or the act of desisting from bidding for the premises at an auction,⁶³ were not such as to invoke equitable assistance in the enforcement of an oral agreement.

Although specific performance was not decreed because of the particular facts involved, the principle that delivery of possession will take a case out of the Statute was recognized in *Hawkins v. Holmes*;⁶⁴ *Seagood v. Meale*;⁶⁵ *Buckmaster v. Harrop*;⁶⁶ and *Clinan v. Cooke*.⁶⁷ For whatever value dicta may have in developing the law, these cases were important.

By 1765 the various theories had run their course in England,

58. *Id.* at 52.

59. *Ibid.*

60. *Smith v. Turner*, Prec. Ch. 561 (Ch. 1720).

61. *Cole v. White*, 1 Bro. C. C. cited 409, 2 Chaffee & Simpson, Cases on Equity 1089 (Ch. 1767).

62. *Clerk v. Wright*, 1 Atk. 12, 26 Eng. Rep. 9 (Ch. 1737).

63. *Lamas v. Bayly*, 2 Vern. 626, 23 Eng. Rep. 1011 (Ch. 1708).

64. 1 P. Wms 770, 24 Eng. Rep. 606 (Ch. 1721).

65. Prec. Ch. 560, 24 Eng. Rep. 251 (Ch. 1721).

66. 7 Ves. 341, 21 Eng. Rep. 139 (Rolls 1802).

67. 1 Sch. & Lef. 22 (Ir. Ch. 1802).

so that the principles governing the application of the law of part performance had become fixed. Although there were later dicta to the contrary, nevertheless, the cases had adjudicated that payment of the purchase price was not in itself recognized as an act of part performance. It was settled beyond the point of dispute that delivery of possession to the purchaser or the lessee would take the contract out of the Statute. If in possession prior to the agreement, a purchaser must show that valuable improvements were added to the premises in reliance upon the contract, and that it would be a fraud to enforce the Statute against him. In most instances the pattern for the type of act that would constitute fraud had been judicially traced. Although occasionally challenged in later litigation, nevertheless, the above principles had been stated in their final form.

PART PERFORMANCE IN THE UNITED STATES PRIOR TO 1850

The Statute was enacted in many of the states in substantially the same form as the Parent Act.⁶⁸ Perhaps the draftsmen borrowed more than they bargained for; as the American Judiciary soon found themselves struggling with the same problems of construction that had perplexed their English counterpart.

But where as in Britain only one system of courts wrestled with the Statute, on the western side of the Atlantic as many courts as there were states were making independent interpretations of the Enactment. The majority of the American jurisdictions ostensibly followed the English adjudications, although in some instances the language of the court criticizing the doctrine was adopted rather than the actual holding of the British tribunals.

The year 1805 witnessed cases of first impression decided on an identical set of facts in the appellate courts⁶⁹ of the states of Con-

68. Although in some jurisdictions Section Four was enacted in different language, the courts have applied the same construction to its revised form. See 2 Chaffee and Simpson, *Cases on Equity* 1054 (1934). The various statutes will be discussed in detail in Part II of this article.

69. Adjudications recognizing part performance had been made in a number of states by trial courts. Examples are *Rogers v. Tracy*, 1 Root 233 (Conn. 1790); and *Smith v. Broilsford*, 1 Desaus Ch. 350 (S.C. 1794).

70. *Downey v. Hotchkiss*, 2 Day 225 (Conn. Sup. Ct. of Errors 1805). The subsequent Connecticut cases recognized that part performance takes a case out of the Statute, but the court did not attempt to define the acts recognized as being sufficient. In *Church v. Sterling*, 16 Conn. 388 (1844) specific execution was decreed upon a showing that the plaintiff had entered into possession and made valuable improvements. Similarly, in *Annan v. Merri*, 13 Conn. 478 (1840) entry had been made and valuable improvements added. In *Crocher v. Higgins*, 7 Conn. 342 (1829), the court stated as a general principle that where the acts done are performed with a view to the agreement claimed, the contract is within the Statute.

necticut⁷⁰ and New York.⁷¹ In each instance the plaintiff alleged part payment, an entry into possession and the addition of improvements. Affirming the Chancellor's decree of specific performance, the High Court of Connecticut neither wrote an opinion nor divulged the theory on which the case was decided.

The New York Court⁷² had no difficulty in finding grounds for granting specific execution in the case before it. To allow the Statute to bar the performance of agreements partly executed, reasoned the Court, would be to encourage the mischiefs the legislature intended to prevent. Language in later New York cases⁷³ suggested the principle that in accordance with the English rule, taking of possession was in itself sufficient part performance, when referable to the contract, and if performed as owner of the estate. However, the point had not been decided by 1850, as evidenced by the fact that some of the cases intimated that only in the case of equitable fraud would such oral contracts be enforced.

Notwithstanding that its Statute of Frauds did not contain the provisions of Section Four of the original act and despite the fact that it had no court of chancery, Pennsylvania, nevertheless, recognized the doctrine of part performance in 1807.⁷⁴ The handicap of not having a court of equity was overcome by applying equitable principles in suits at law. Since the theory of Section Four with reference to parol contracts was adopted as a matter of judicial rather than legislative policy, the Court felt constrained to adopt the interpretations of the Section which, of course, included part performance. The judges were unable to agree on the principles underlying the English cases, so that while one line of cases supported the proposition that delivery of possession took the contract out of the operation of the Statute,⁷⁵ another line required in addition to possession, expenditures by the purchaser.⁷⁶ In one instance the court announced that specific execution would be decreed when

71. *Wetmore v. White*, 2 Caines 87, 2 Am. Dec. 323 (N.Y. Sup. Ct. 1805).

72. *Ibid.*

73. The leading case, *Parkhurst v. Van Cortland*, 14 Johns. 15, 7 Am. Dec. 427 (N.Y. Sup. Ct. of Jud. 1816) stated the part performance was based on fraud, such as where the purchaser makes improvements. However, in *Harris v. Knickerbacker*, 5 Wend. 638 (N.Y. Sup. Ct. of Jud. 1830) the purchaser's survey and entry were held to be sufficient. Other cases do not clearly state which acts of part performance will take a case out of the Statute.

74. *Elbert v. Wood*, 1 Binn. 216 (Pa. 1807).

75. *Gilday v. Watson*, 2 S. & R. 407 (Pa. 1816); *Pugh v. Good*, 3 W. & S. 56, 37 Am. Dec. 534 (Pa. 1841); *Miller v. Specht*, 1 Jones (11 Pa. St.) 449 (1849); *Reed v. Reed*, 2 Jones (12 Pa. St.) 117 (1849).

76. *Stewart v. Stewart*, 3 Watts 253 (Pa. 1834); *McKee v. Phillips*, 9 Watts 85 (Pa. 1839).

necessary to achieve justice.⁷⁷ The latter rule invited no small amount of controversy since wide differences of opinion existed as to when justice is achieved in cases involving oral contracts.

The first case reaching the High Court of South Carolina presented a controversy initiated by a plaintiff who had failed to establish either a transfer of possession or payment of the consideration. Although rendering an adverse decision to the plaintiff on the above set of facts, the Supreme Court of South Carolina, declared in *Gwens v. Calder*⁷⁸ that specific performance would be decreed if the defendant either confessed the agreement, admitted the acts of part performance or received payment of consideration. Although the Court cited no authorities in the opinion, briefs of counsel indicate that ample citations of the leading English cases were furnished.⁷⁹ While the question of whether or not part payment was sufficient part performance was still being argued in the Mother Country, it was a closed issue that the Statute was not waived by the defendant's admission of the oral contract.

Rejecting outright the doctrine of part performance, the Court of Appeals in Kentucky in 1808⁸⁰ declared that as a result of the exceptions read into the Act, the mischiefs remedied by the Statute were left almost as much without redress as before. The Court also noted, as an additional ground for refusing to follow the English construction of the Act, that the Chancellors by "contrary and irreconcilable decisions" had rendered it an uncertain and perplexed rule of action.⁸¹

In the neighboring state of Tennessee litigation is reported for the year 1812⁸² in which the plaintiff claimed payment of the consideration was such part performance as to take the case out of the Statute. Denying relief, the court observed that whether the case was tested by the words of the Statute, or the better construction by the English judges of their own Act, judgment should be against the plaintiff. The Supreme Court of Errors and Appeals stated in a later case⁸³ that open and exclusive possession on the part of the purchaser, coupled with payment of the purchase price, would take

77. *Smith v. Patton*, 1 S. & R. 80 (Pa. 1814).

78. 2 Des. 171 (S.C. 1803).

79. Cases cited by counsel included *Butcher v. Stapely*, 1 Vern. 374 (Ch. 1685); *Pike v. Williams*, 2 Vern. 454 (Ch. 1703); *Whitchurch v. Bevis*, 2 Dick. 664 (Ch. 1786); *Lacon v. Mertins*, 3 Atk. 1 (Ch. 1743); *Clerk v. Wright*, 1 Atk. 12 (Ch. 1737); and *Whaley v. Bagnal*, 6 Bro. P. C. 45 (H.L. 1765).

80. *Grant v. Craigmiles*, 1 Bibb (4 Ky.) 203 (1808).

81. *Hayden v. McIlwain*, 4 Bibb. (7 Ky.) 57 (1815).

82. *Townsend v. Sharp*, 2 Overton 192 (Tenn. 1812).

83. *Cox v. Cox*, 1 Peck (Tenn.) 468 (1824).

a case out of the Statute. Conceding that the English cases were inconsistent, the Court declared that it was bound by the British decisions, at least to the extent that they seemed to be founded on good sense.

However, in the later Tennessee decision of *Patton v. McClure*,⁸⁴ specific performance was denied, the Court disclaiming any power to relieve against any of the provisions of the Statute. Prior cases were distinguished on the ground that any references that they made to the doctrine of part performance were dicta. Later cases were decided in Tennessee⁸⁵ in accord with the *Patton* litigation setting the issue at rest in that state.

In an opinion rendered by Chief Justice Chipman of the Vermont Supreme Court in 1814, he proposed that the question be asked, "does the part performance with the attending circumstances, make a case of fraud, against which a court of equity ought to relieve?"⁸⁶ The learned Chief Justice implied that possession would not be sufficient unless valuable improvements were made. Since possession was not transferred, and specific performance was denied, the enunciation with reference to improvements may be treated as dicta. However, in disposing of another issue of the cause, the court held the defendant could plead the Statute in bar of the action, and that his failure to answer would not be taken as an admission that a contract had been agreed upon by the parties. However, refusal to answer a petition setting out acts of part performance would result in a decree by default for the complainant. The question with reference to whether a transfer of possession was a sufficient act of part performance had not been decided by 1850.

In the Commonwealth of Virginia a divided Court of Appeals⁸⁷ decreed specific performance in a suit brought by a purchaser who had added improvements in reliance upon the agreement. While one of the judges, following Lord Redesdale,⁸⁸ declared that the construction of the Statute by the equity courts had produced more evil than good, another jurist stated that if the case were presented for the first time in a similar situation, equity would give the suffering party relief. The Court did not attempt to lay down general principles to be applied in determining the acts that constitute part performance.

84. 1 M. & Y. 468 (Tenn. 1828).

85. *Ridley v. McNarry*, 2 Humph. (Tenn.) 174 (1840). Cases arising after 1850 were decided in accord with the *Ridley* litigation.

86. *Meach v. Stone*, 1 D. Chip. 182, 190 (Vt. 1814).

87. *Anthony v. Leftwich*, 3 Rand. 238 (Va. 1825).

88. *Lynch v. Lindsley*, 2 Sch. & Lef. 4 (Ir. Ch. 1804).

*Davenport v. Mason*⁸⁹ was resolved by the Supreme Judicial Court of Massachusetts in 1818. The plaintiff upon taking possession, constructed improvements in reliance on the seller's promise to convey. In response to the vendor's refusal to perform, the purchaser brought an action in assumpsit and was awarded judgment. The Court noted that the instant case represented an obvious attempt to shelter fraud under a statute enacted for its suppression, and observed that a stronger case of equity on the part of the purchaser could not be imagined. Even though the issue was not raised in the case, the Court cited cases to sustain the proposition that delivery of possession was a sufficient execution. However, in later litigation the *Davenport* case was overruled.⁹⁰ While it was suggested in other cases that part performance might be recognized in equity,⁹¹ the proposal had no meaning since Massachusetts courts did not have general equity jurisdiction, and since they were only empowered to compel specific execution of written contracts. Obviously parol contracts could not be enforced under such a statute. The Massachusetts cases were frequently cited by other American Courts without a realization of their statutory setting.

Notwithstanding that it was apparently a case of first impression, the Supreme Court of Indiana decided *Tibbs v. Barker*⁹² without citing cases or giving reasons. Possession, payment of consideration and the receipt of land office certificate were held to be acts that would take the contract out of the Statute. In a more fully considered case,⁹³ the same Court refused to decree specific performance where a tenant already in possession, purchased the premises and added valuable improvements. The Court failed to distinguish between the line of cases, holding that the taking of possession is part performance, and the series holding that the mere continuance of possession is not of itself a sufficient act. In the case under consideration no weight was given to the purchaser's act of making expenditures in reliance on the agreement. In a later adjudication⁹⁴ involving the twin acts of delivery of possession by the vendor and the outlay for improvements by the purchaser,

89. 15 Mass. 85 (1818).

90. In *Kidder v. Hunt*, 1 Pick. (18 Mass.) 328, 11 Am. Dec. 183 (1823), involving an action in Assumpsit, the court disclaimed the jurisdiction in a court of law to recognize part performance, even though Massachusetts had no court of Chancery. The statements in the *Davenport* case, recognizing part performance, were considered dicta.

91. *Thompson v. Gould*, 20 Pick. (37 Mass.) 134 (Sup. Jud. Ct. 1838), *Adams v. Townsend*, 1 Metc. (42 Mass.) 483 (1840).

92. 1 Blackf. 58 (Ind. 1820).

93. *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45 (Ind. 1835).

94. *Underhill v. Williams*, 7 Blackf. 125 (Ind. 1844).

specific performance was decreed. The Court rationalized its decision on the ground that it was preventing a fraud on the purchaser by enforcing the contract.

While the leading case in North Carolina, *Ellis v. Ellis*,⁹⁵ was resolved as early as 1828, the rule adopted in that State did not appear in its final form until much later. The Supreme Court in the first of two opinions delivered in subsequent stages of the *Ellis* litigation, declared that acts in part performance referable to the contract, would avoid the dangers anticipated by the Statute, and specific performance would be decreed. In the second appeal⁹⁶ specific execution was denied in the light of the defendant's averment that a different contract had been agreed upon by the parties. The High Tribunal concluded in their second deliberation that the plaintiff's act of taking possession did not obviate the objection and the impropriety of going into an inquiry to ascertain the terms of the oral bargain.

Later cases⁹⁷ construed the reasoning advanced in the *Ellis* litigation to mean that parol contracts would not be specifically enforced, although it was recognized that a separate equity might arise because of the plaintiff's reliance on the agreement. It was proposed by the court that compensation be awarded in the latter case.

The Alabama Supreme Court,⁹⁸ in disposing of an appeal in 1836, expressed a regret that there had ever been a departure from the letter of the Statute. However, the Court declared that the Alabama statute was adopted with the decisions of the English and American Courts on this point in the contemplation of the legislature. Bound by authority, the Court specifically enforced an oral contract on behalf of a purchaser who had made improvements after the transfer of possession.⁹⁹

In a well reasoned opinion written in 1839,¹⁰⁰ the Supreme Court of Arkansas joined the ranks of the courts deploring the fact that equity had taken any cases out of the requirements of the Statute. Despite its preference in the matter, the Court did not consider itself at liberty to disregard the whole current of English and American decisions that have been made upon the Statute.

95. 1 Dev. Eq. 181 (N.C. 1828).

96. *Ellis v. Ellis*, 1 Dev. Eq. 342 (N.C. 1828).

97. *Baker v. Carson*, 1 Dev. & Bat. Eq. 381 (N.C. 1836); *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9 (N.C. 1838); *Dunn v. Moore*, 3 Ired. Eq. (N.C.) 364 (1844); *Allen v. Chambers*, 4 Ired. Eq. 125 (N.C. 1845).

98. *Allen v. Booker*, 2 Stew. 21, 19 Am. Dec. 23 (Ala. 1829).

99. *Brock v. Cook*, 3 Port. 464 (Ala. 1836).

100. *Keatts v. Rector*, 1 Pike. 391 (Ark. 1839).

Addressing themselves to the question of what constituted part performance, they found two classes of cases. One group arose when possession was delivered under the contract and in reference to it; while in the other line of cases specific performance was decreed where the purchaser had changed his position because of the bargain, and hardship would result if the agreement was not performed. Possession having been delivered to the plaintiff in accordance to and referable to an oral agreement, specific execution was decreed in the case at bar.

In 1840¹⁰¹ the Court of Last Resort of Illinois, declining to enter into a discussion of the contradictory decisions of the English and American courts, declared that there was no question but that where in the same case there was delivery of possession, payment of the purchase price and the making of improvements, equity would enforce the contract. The purchaser, having satisfied the above requisites, was granted specific enforcement.

Decided in 1848 by the Supreme Court of Iowa, *McCoy v. Hughes*¹⁰² arose from the defendant's failure to convey a land claim which he had agreed to sell. The plaintiff had entered into possession and had made valuable improvements pursuant to the oral agreement. "Principles of soundest morality sanctioned by the rules of justice and equity," declared the Court, "require relief against such fraud."¹⁰³

Overruling prior Chancery cases,¹⁰⁴ which have recognized part performance, the Supreme Court of Mississippi declared in 1848¹⁰⁵ that the Mississippi Statute of Frauds contained no exceptions and hence oral land contracts would not be enforced either in law or equity. In the year following the High Court reiterated its previous stand, announcing that if the Statute was too rigid in its terms, the remedy was within the power of the legislature.¹⁰⁶

Although cases of first impression had also been decided in the courts of Delaware,¹⁰⁷ Maine,¹⁰⁸ Maryland,¹⁰⁹ Ohio,¹¹⁰ Mis-

101. *Thornton v. Vaughan*, 2 Seam. (3 Ill.) 219 (1840).

102. 1 Greene 370 (Iowa 1848).

103. *Id.* at 374.

104. *Finucane v. Kearney*, 1 Freem. Ch. 65 (Miss. 1843); *See Hood v. Bowman*, 1 Freem. Ch. 290 (Miss. 1843).

105. *Beaman v. Buck*, 9 Smedes & M. (Miss.) 207 (1848).

106. *Box v. Stanford*, 13 Smedes & M. (Miss.) 93, 51 Am. Dec. 142 (1849).

107. *Houston v. Townsend*, 1 Del. Ch. 416, 12 Am. Dec. 109 (1833), *aff'd*, 1 Harr. 532, 27 Am. Dec. 732 (Del. 1835) (payment of money may be recognized to be performance of a parol contract concerning lands).

108. Maine followed Mass. . . . *Wilton v. Harwood*, 33 Maine 13 (1843). Only a limited equity jurisdiction was conferred on the court.

souri,¹¹¹ New Hampshire,¹¹² New Jersey,¹¹³ Michigan¹¹⁴ and Wisconsin¹¹⁵ by 1850, they added no new principles to those developed in the foregoing discussion.

THE UNCERTAINTY IN THE AMERICAN CASE LAW OF PART PERFORMANCE MAY BE TRACED TO ITS HISTORICAL DEVELOPMENT

Whether or not the draftsmen intended that the provisions of Section Four should apply to bills in equity is now a matter of no consequence. What was the attitude of the eighteenth century judiciary, is the question to be determined; for if the judges of that period understood the Statute to exclude suits in equity from its operation, the cases must be analyzed in terms of the construction of that date, rather than the interpretation that would be made today.

Considered in this setting, the post-statute cases are significant, not only because they established that the acts of delivering possession to the vendee or the act of making improvements are sufficient to invoke equitable aid on behalf of the purchaser, but also because in arriving at these decisions, the courts were at the same time adjudicating that the Statute did not prohibit chancery from enforcing oral contracts in that forum.

109. *Drury v. Connor*, 6 Harris & J. 288 (Md. 1823) (delivery of possession and payment will take a case out of the Statute); *Hamilton v. Jones*, 3 Gill & J. 127 (Md. 1831) (to withhold relief would be to suffer a party seeking to shelter himself under the Statute of Frauds, to commit fraud); *Beard v. Linthicum*, 1 Md. Ch. 345 (1848) (complainant must show acts unequivocally referring to and resulting from that agreement, such as the party would not have done unless on that agreement).

110. *Sites v. Kellar*, 6 Ham. 484 (Ohio 1834) (payment of purchase price does not take the case out of the Statute).

111. *Bean v. Valle*, 2 Mo. 126 (1829) (distinction between delivery of possession and taking of possession, the former only recognized as a sufficient act); *Chambers v. Lecompte*, 9 Mo. 336 (1845) (payment of money not a sufficient act).

112. *Newton v. Swazey*, 8 N. H. 9 (1835) (specific performance decreed where plaintiff enters into possession and makes improvements; Dicta that confession of agreement in defendant's answer takes the case out of the Statute); see *Tilton v. Tilton*, 9 N. H. 385 (1838).

113. *Casler v. Thompson*, 3 Green (4 N.J. Eq.) 59 (1837) (delivery of possession, payment of purchase price and adding of improvements takes a case out of the Statute).

114. *Burch v. Hogge*, 1 Har. 31 (Mich. 1842) (payment of purchase money and adding of improvements sufficient acts of performance); *accord*, *McMurtrie v. Bennette*, 1 Har. 124 (Mich. 1842). In *Weed v. Terry*, Walk. Ch. 501 (Mich. 1844), delivery of possession held sufficient act to take case out of the Statute.

115. *Bowen v. Warner*, 1 Pin. 600 (Wis. 1845) (Act of continuing possession held not sufficient to prove part performance. Ground of the interference by the court is that there is fraud on the part of the seller in resisting the agreement).

Once it had been adjudged that equity would decree specific performance if possession were delivered or improvements were added in reliance on the agreement the rationalization of the court is unimportant. The application of the doctrine of *stare decisis* rendered certain that specific performance would be decreed upon a showing by the complainant of a like set of facts. Principles were promulgated by the courts not for the purpose of establishing jurisdiction but for guidance in deciding when the chancery jurisdiction should be exercised. Rules were formulated to determine when a case came within the policy of the Statute, and not to create reasons to take it out of the Statute.

The American courts were troubled by the conflict in the English decisions with reference to the doctrine of part performance. But what the courts failed to realize, and what clearly appears when the case law is studied historically, is that the conflict involved only a few issues. They assumed disproportionate dimensions because of the long period of time in which they remained unsettled. Reference has been made in previous paragraphs to the difficulty the courts had with the question of whether payment of the purchase price was an act of part performance,¹¹⁶ and the problem of the confessed oral agreement¹¹⁷ in relation to the defendant's right to plead the Statute. These relatively minor questions created an appearance of uncertainty that lingered long after the issue had been finally determined. The power of the court to grant relief if possession had been delivered to the purchaser, or if the purchaser had made permanent improvements in reliance upon the agreement, were unquestioned after 1700. Even the effect of part payment and the confession of the oral contract had been determined by 1765, and had the American courts been more discerning in their selection of precedents, the welter of confusion would have never occurred.

What produced the conflict in American case law? In response it may be stated that the confusion in the law may be traced to the reception of the doctrine of part performance in this country. Despite the fact that the original Act was adopted in the eastern states in substantially its same form, and in spite of the existence of an ample number of cases construing the Parent Act, the states adopted a multiplicity of interpretations. Some of the courts¹¹⁸ either from the beginning or after a brief struggle with the British

116. *Supra* at note 46.

117. *Supra* at note 38.

118. Kentucky *supra* at note 80; Tennessee *supra* at note 84; North Carolina *supra* at note 96; and Mississippi *supra* at note 105.

cases, announced that not being bound by the English construction, they did not propose to read exceptions into the Act. This effectively erased the confusion not to mention the fact that it obstructed the rendition of justice.

A contrary position was taken in some jurisdictions, where after carefully examining the British rule and after identifying the dual characteristics of the doctrine, the court marked out a pattern that produced no subsequent difficulty.¹¹⁹

The remainder of the jurisdictions made mistakes which fell into three categories. The error committed by those of the first group consisted of mixing factual situations which had been adjudicated to be part performance, such as delivery of possession, with the rationalization emerging from controversies resolved on acts of another nature. The consequence was the formulation of a rule in some instances that specific performance would not be decreed unless the delivery of possession was coupled with the making of valuable improvements. Thus a new principle has been pronounced because of a misunderstanding of the English cases.¹²⁰

A similar result was reached through accident where the first case decided by a court involved a number of facts, any one of which would have justified specific performance of the contract. By promulgating principles unduly restrictive in scope, the courts adjudicating that particular case, made difficult the adjudgment of future cases. If the court asserts that equitable fraud is the basis for enforcing oral land contracts in the first case, the second controversy may only involve a transfer of possession. The court is faced with a dilemma; for on the one hand the English cases recognize that the act of delivering possession is sufficient part performance, while on the other hand, the court has previously announced that part performance was based on equitable fraud. The tribunal can modify the former holding, or start a new line of cases, or it can rationalize that permitting the purchaser to enter into possession was a specie of fraud. If either of the latter two alternatives is followed, confusion in the law is produced.¹²¹

Failure to distinguish between the issues relating to the doctrine of part performance that had not been decided, and those that had been finally determined, was the second type of mistake. When a court discovered they were following cases long overruled in the

119. Arkansas *supra* at note 101; Ohio *supra* at note 110.

120. New York *supra* at note 73.

121. Other examples are Connecticut *supra* at note 70, Pennsylvania *supra* at notes 75 and 76, and Maryland *supra* at note 109.

parent country, it was necessary to backtrack if their decisions were to be brought in line with the prevailing rule. This, they often did by distinguishing cases or by ignoring previous errors in preference to overruling the cases by direct language. Illustrative of this mistake are the cases that stated part payment is a sufficient act of part performance.¹²²

The third error was in the acceptance of Lord Redesdale's declaration that the Statute had resulted in as great a fraud as the Statute was designed to protect. The attempt to simultaneously apply Lord Jeffrey's construction of the Statute as expressed in the precedents, and Lord Redesdale's opinions, resulted in the creation of reasoning incompatible with either.¹²³

In conclusion it may be said that in individual cases, the oral agreement claimed by the complainant was often a fraudulent one, which led the chancellor deciding the controversy to condemn all agreements. Thus blinded by the chancellor's repudiation of individual cases, the American courts often overlooked the fact that part performance had survived criticisms directed against it for more than four centuries only because it was based on a sound equitable principle. It is this fact that must be kept in mind in analyzing any and all cases of part performance.

In a subsequent article the cases decided after 1850 will be discussed and an analysis made of the state of the law of part performance as it exists today.¹²⁴

122. This is illustrated by New Hampshire *supra* at note 112. Observe the dicta relating to the effect of defendant's confession of the oral agreement in his answer.

123. Illustrative of this point are Indiana *supra* at note 92, and Alabama *supra* at note 98.

124. No attempt has been made to classify the cases on the basis of the various theories advanced in explanation of part performance. However, the classification will be analyzed in part two of this article.